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IN THE

Supreme Court of the United States

No. 141.

October Term, 1955.

ISAAC CHAITT,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

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PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Supreme Court of Pennsylvania is reported at 380 Pa. 532 (41). The opinion of the Superior Court of Pennsylvania is reported at 176 Pa. Super. Ct. 137 (20). The opinion of the Court of Quarter Sessions of Lancaster County, Pennsylvania is unreported (13).

Jurisdictional Statement.

The final order of the Supreme Court of Pennsylvania, which affirmed the order of the Superior Court of Pennsylvania, was entered on March 14, 1955 (41). The final order of the Superior Court, which affirmed the judgment of the Court below, was entered on July 13, 1954 (20).

Jurisdiction to review the above mentioned final order of the Supreme Court of Pennsylvania is conferred upon this Court by the Act of June 25, 1948, c. 646, 62 Stat. 929 (28 U. S. C. A. 1257).

Question Presented.

Has the Supreme Court of Pennsylvania erroneously construed the Federal Communications Act of 1934 and thus deprived petitioner of rights and privileges under said statute by holding, contrary to the decisions of this Court, that said Act is not violated and that no federal crime is committed by a state official who testifies in a state court, without the consent of the sender, to the contents of an intrastate telephone conversation which he intercepted by means of a wire tap?

Statutory Provisions Involved.

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1103 (47 U. S. C. A. 605), provides in pertinent part as follows:

> ". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . ."

Section 501 of the said Federal Communications Act, 48 Stat. 1100 (47 U. S. C. A. 501), provided in pertinent part:[1]

> "Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willingly and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be pun-

1. Section 501 was amended subsequent to the trial of this case by the Act of March 23, 1954, c. 104, 68 Stat. 30 (47 U. S. C. A. 501) to provide that an offense punishable thereunder, except a second or subsequent offense, shall constitute a misdemeanor rather than a felony.

ished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both."

Statement of the Case.

Petitioner was indicted, tried and convicted in the Court of Quarter Sessions of Lancster County, Pennsylvania, on a charge of bookmaking, for which he was sentenced to imprisonment and fined (19).

The principal evidence adduced by the Commonwealth in support of the bookmaking charge consisted of certain telephone conversations between petitioner and another in the City of Lancaster, Pennsylvania, which were intercepted by means of a wire tap placed on petitioner's telephone wire by two Lancaster police officers. These officers were permitted to testify to the overheard conversations over petitioner's objections, one of which was that such testimony violated the Federal Communications Act of 1934 (R. 59a).

On appeal the Superior Court of Pennsylvania (one judge dissenting) affirmed the judgment of the Court below (34), and upon certiorari, the Supreme Court of Pennsylvania (one judge dissenting) affirmed the order of the Superior Court (48).

Both the Superior and Supreme Courts of Pennsylvania recognized that petitioner is entitled to a new trial if the wire tap testimony was improperly admitted (21, 41). Petitioner's sole contention in these Courts was that the wire tap testimony should have been excluded, not because the Federal Communications Act promulgates a rule of evidence which requires state courts to exclude wire tap testimony, but as a matter of public policy because the introduction of such evidence is itself a violation of the Federal Communications Act, and the Court, by admitting such evidence thereby sanctions the commission of a federal

offense in the very presence of the Court. The Supreme Court stated petitioner's contention as follows (45):

> ". . . the more important question is whether State agents engaged in the detection of a State crime and testifying in a State court are included within the intended scope of Section 605 of the Act. It is the contention of appellant that they *are* so included and that therefore they not only commit a crime when they *intercept* a communication but an additional crime when they *divulge* it by testimony in court; accordingly he argues that for the court to allow them to give such testimony is practically to sanction and condone the commission of a criminal offense in its very presence, and therefore, even though their testimony be relevant to the determination of the guilt or innocence of the person on trial, it should not be received under such circumstances. Appellant would thus distinguish the search and seizure cases previously referred to on the ground that there the witness merely testified to the information gained by a crime already committed but did not commit another crime in and through the very act of testifying."

While recognizing that the Act is violated by a federal officer who testifies regarding a wire tap conversation in a Federal court, the Supreme Court of Pennsylvania, as did also the Superior Court, held that the Federal Communications Act does not make it a criminal offense for a state officer to give such testimony in a state Court (45, 46).

Reasons for Granting the Writ.

1. The decision of the Supreme Court of Pennsylvania is in conflict with the decisions of this Court.

There are three decisions of this Court which we submit make it clear that it is a violation of the above-quoted provision of Section 605 of the Federal Communications Act and, therefore, a crime under the provisions of Sec-

tion 501 of the Act, for any witness, including a state officer, to testify in any Court, including a state Court, to an intercepted intrastate as well as an interstate telephone conversation, without the consent of the sender:

(1) *Nardone v. United States, 302 U. S. 379 (1937).*

This was the first case to reach this Court following enactment of the Federal Communications Act. It established the rule that evidence obtained by wire tapping is inadmissible in prosecutions in federal courts. Federal agents were permitted by the lower court to testify concerning telephone conversations between the defendant and others, which the agents overheard by means of a wire tap. This Court held that the broad language of Section 605 of the Federal Communications Act forbade the officers to divulge the intercepted conversations, even by testifying in court, and therefore, that their testimony should have been excluded. It was argued in that case that the words "no person" in Section 605 did not include federal agents engaged in the detection of crime, and that the words "divulge and publish" were not intended to include testimony before a court in a criminal prosecution. These contentions were rejected by the Court, which, in an opinion by Justice Roberts, said:

> "Taken at face value, the phrase 'no person' comprehends federal agents, and the ban on communication to 'any person' *bars testimony* to the content of an intercepted message." (page 381)
>
> • • •
>
> "We nevertheless face the fact that the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that *'no person'* shall divulge or publish the message or its substance to *'any person'*. To recite the contents of the message in testi-

> mony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments." (page 382)

There is nothing whatever in the statute which affords any basis for concluding, as did the Supreme Court of Pennsylvania, that Congress intended to prohibit only federal law enforcement officers from intercepting and divulging telephone messages and did not intend to prohibit such conduct on the part of state officials. The Act itself makes no exceptions and the *Nardone* case holds that it forbids *anyone* to tap wires and relate the overheard conversations. Had Congress intended to exempt any law enforcement officials from the operation of the statute, it would have been federal officers and the fact that it did not intend to exclude federal agents, as the *Nardone* case holds, is all the more reason for holding that it does not exclude state officers.

(2) *Weiss v. United States, 308 U. S. 321 (1939).*

It was decided in this case that the prohibition in Section 605 against the interception and divulgence of telephone communications applies to intrastate as well as interstate messages.

Despite the clear language of the Court in that case, the Pennsylvania Supreme Court said (44, 45):

> "In the present case there were *no* interstate communications, all the telephoning between defendant and Manducci taking place within the city of Lancaster. There may be some room to doubt, therefore, whether the power of Congress to regulate interstate commerce extends to such a situation, or, if so, whether the decision in the *Weiss* case was intended to be broad enough to include the interception of purely local messages."

(3) *Schwartz v. Texas, 344 U. S. 199 (1952).*

In this case the Court was asked to decide whether section 605 barred intercepted telephone communications from use as evidence in state courts. It held that Congress did not intend to impose a rule of evidence on state courts by section 605 and that the individual state courts were thus free to formulate their own rule of evidence on this issue. The Court pointed out, however, that in arriving at their decision, the state courts should consider the fact that a witness who testifies to the contents of an intercepted message violates the act of Congress. In an opinion by Justice Minton, the Court said (201):

> ". . . Although the statute contains no reference to the admissibility of evidence obtained by wire tapping, it has been construed to render inadmissible in a court of the United States communications intercepted and sought to be divulged in violation thereof, *Nardone v. United States,* 302 U. S. 379, and this is true even though the communications were intrastate telephone calls. *Weiss v. United States,* 308 U. S. 321, 329. Although the intercepted calls would be inadmissible in a federal court, it does not follow that such evidence is inadmissible in a state court. Indeed, evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is nonetheless admissible in a state court, *Wolf v. Colorado,* 338 U. S. 25, while such evidence, if obtained by a federal officer, would be clearly inadmissible in a federal court. *Weeks v. United States,* 232 U. S. 383. *The problem under § 605 is somewhat different because the introduction of the intercepted communications would itself be a violation of the statute, but in the absence of an expression by Congress, this is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts."* (Emphasis supplied.)

The Supreme Court of Pennsylvania regarded the above-italicized language of this Court as merely dictum. In a footnote to its opinion, the Pennsylvania Supreme Court said (46):

> "3. The statement on page 201 that 'the introduction of the intercepted communications would itself be a violation of the statute' is obviously dictum, not being borne out by the actual decision of the court and being inconsistent with the decision in that, if such testifying were to constitute the commission of a federal crime, the court would scarcely have decided or Congress have intended that the States were at perfect liberty to permit and even invite the breach of a federal penal statute."

The Pennsylvania Supreme Court failed to realize that it is one thing for Congress to make criminal, conduct which falls within its power to regulate, and an entirely different matter for Congress to dictate to state courts what evidence they can admit. Congress's power to prescribe sanctions for acts which it has the power to prohibit, such as interception and divulgence of telephone communications, is unquestionable; whereas it is doubtful that Congress has the authority to promulgate a rule of evidence binding on state courts any more than the states have the power to prescribe rules of evidence for federal courts. (See *United State v. Reid,* 53 U. S. 361, 363 (1851); *Olmstead v. United States,* 277 U. S. 438, 469 (1928).)

Section 605 does not contain any reference to the admissibility of wire tap evidence in any court, and because of the absence of a clear manifestation on the part of Congress, the Court in the *Schwartz* case said that it did not believe that Congress intended to impose a rule of evidence on the state courts which would require them to exclude wire tap evidence, even if it had the power to do so. The *Schwartz* case makes it clear beyond any question, however,

that Congress did intend to make it a crime for a witness to testify to a wire tapped conversation in a state court, as well as in a federal court, and this is clearly within the power of Congress.

The rationale of the *Schwartz* case is this: Since Congress did not intend by section 605 to impose a rule of evidence on state courts, the latter are free to adopt their own rules as to the admissibility of wire tap evidence even though testimony concerning an intercepted communication would violate the act of Congress, the same as they are free to make their own rules with respect to admissibility of evidence obtained by unlawful search and seizure. But, admonishes the Court, while they can admit wire tap evidence if they want to, the state courts should bear in mind that the problem as to wire tap evidence is different from that involving evidence obtained by unlawful search and seizure, "*because the introduction of the intercepted communication would itself be a violation of the statute. . . .*" (344 U. S. 201). This language is not merely dictum to be ignored by the state courts, but a clear and unequivocal expression, constituting a part of the holding in the case, that it is a violation of the act of Congress, which is punishable as a crime, for a witness to testify in a state court to an intercepted telephone communication.

In summary, this Court has held that the Federal Communications Act forbids *anyone* to tap wires or divulge the overheard communications, even by testifying in Court; that the act applies to *intrastate* as well as interstate messages; and that while the state courts are free to adopt their own rules with respect to the admissibility of wire tap evidence they should bear in mind that the *very introduction of the evidence violates the federal statute.* On the other hand, the Supreme Court of Pennsylvania has held that the Act does not apply at all to state officers testifying in state courts; that it is doubtful that the act applies to intrastate messages; and that this Court did not mean what it said in *Schwartz v. Texas, supra,* to the effect that introduction of

such evidence in a state court would violate the federal statute.

2. Petitioner is entitled to have the issue of the admissibility of the wire tap evidence in this case determined by the Supreme Court of Pennsylvania in accordance with the construction placed on the federal statute by this Court, which, we submit, would lead to a decision by the Pennsylvania court that such evidence should have been excluded.

In *St. Louis I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 293, this Court said:

> ". . . Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union."

The Supreme Court of Pennsylvania recognized that if the federal statute be construed to make it a crime for a state agent to testify in state court to intercepted telephone communications, it would make it "practically impossible for such testimony to be given" (46). Indeed, it is most inconceivable that a state court would put itself in the position of sanctioning and condoning the commission of

a federal criminal offense right in the courtroom, which would be the effect of admitting such testimony.

It is true, as the Pennsylvania Supreme Court points out (47), that wire tap evidence has been held admissible by the appellate courts in a number of states. However, in all of those cases the state courts dismiss the Federal Communications Act as merely promulgating a rule of evidence for federal courts without taking into consideration, as the *Schwartz* case admonishes, that it is a criminal statute which is violated in a state court as well as in a federal court by a witness who testifies to the contents of an intercepted message. Proper consideration of this factor should have led the state courts to adopt a rule excluding such evidence.

The point here involved goes far beyond the question of whether a state court should admit illegally obtained evidence, because the Federal Communications Act prohibits not only the *interception* of telephone communications but also proscribes the *divulgence* of such messages. It is no answer, therefore, to say, as have most of the state courts which have considered the matter, that the evidence is admissible, notwithstanding it was obtained by means of an illegal wire tap. Since this Court declared in the *Nardone* case that the giving of wire tap testimony in court constitutes a divulgence of the intercepted message, the problem is whether a state court should permit the commission of a crime in its presence, which is what the admission of such evidence amounts to. This is the first case in which the problem appears to have been considered by a state court, and in this case the Pennsylvania court disposes of the problem simply by holding that divulgence of the intercepted message in a state court is no crime, notwithstanding what this Court said in the *Schwartz* case.

3. The importance of the question here involved can not be overemphasized. Unless this Court undertakes to review the decision of the Pennsylvania Supreme Court and clarifies the language in the *Schwartz* case which the

Supreme Court of Pennsylvania branded as dictum, state courts all over the nation will admit wire tap evidence under the belief that the giving of such testimony does not violate the federal act. Furthermore, if allowed to stand as precedent, the Pennsylvania Supreme Court decision will serve as an invitation to state police officers all over the country to tap wires and divulge the intercepted messages with assurance that such conduct is not violative of the federal statute, an assurance which they have not had heretofore. Thus will be emasculated for all practical purposes, a federal statute passed for the purpose of curbing a "dirty business" which Congress "deemed inconsistent with ethical standards and destructive of personal liberty". *Nardone v. United States*, 302 U. S. 379, 383.

Conclusion.

In affirming your petitioner's conviction based on evidence obtained by wiretapping, the Supreme Court of Pennsylvania erroneously construed a federal statute and declared an earlier contrary construction made by your Honorable Court to be mere dictum. Petitioner respectfully submits that the question of whether a state officer violates the Federal Communications Act and commits a federal crime by testifying in a state court to intercepted telephone calls should finally be determined by this Court and not by any lesser tribunal. If the decision here appealed from stands unchanged, earlier pronouncements of this Court will be disregarded and the federal statute rendered ineffective.

WHEREFORE, it is respectfully submitted that a writ of certiorari should be allowed by your Honorable Court to review the record in this case.

Respectfully submitted,

LEMUEL B. SCHOFIELD,
Attorney for Petitioner.

Appendix.

OPINION OF LANCASTER COUNTY, PENNSYLVANIA, COURT OF QUARTER SESSIONS.

Schaeffer, P. J.

The defendant, Issac Chaitt, was convicted for bookmaking and common gambling. Defendant has filed a motion for a new trial. The main reason for a new trial relates to the admission in evidence at the trial of the testimony of Albert Farkas, a Lancaster City Detective, which was obtained by wire tapping of the telephone in the apartment of Richard Manduchi at 715 North Duke Street, Lancaster City, Pennsylvania, and by the interception of telephone calls between Manduchi and the defendant. It is evident that this evidence, if it was properly admitted, was sufficient to sustain the verdict of the jury. Accordingly, the question arises whether evidence obtained by wire tapping is admissible in the courts of Pennsylvania.

Under the Act of Congress, known as the Federal Communications Act of 1934, Section 605, 48 Stat. 1064, records of intercepted telephone conversations are inadmissible in evidence in Federal Courts without the consent of the party. However, in Schwartz v. State, 73 Supreme Court Reporter 232, decided on December 15, 1952 by the Supreme Court of the United States, it is said: "Although the intercepted calls would be inadmissible in a federal court, it does not follow that such evidence is inadmissible in a state court . . . We hold that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings."

There is no Legislation and apparently no Appellate Court decision in Pennsylvania on whether or not evidence obtained by wire tapping is admissible in a criminal prosecution.

In Commonwealth v. Charpentier, 99 Pitts. L. J. 219 (1951), it was decided that evidence obtained by tapping interstate or intrastate telephone lines is admissible in a state court for violation of a state crime as the prohibition of the Fourth Amendment to the United States Constitution against unreasonable search and seizure does not apply to telegraph and telephone messages. Nor does the Federal Communications Act apply to, or limit the power of, state courts to determine the admissibility of such evidence. The wire tapping in that case was done in New York in conformity with Article I, Section 12 of the New York Constitution and Section 813 of the New York Criminal Code authorizing telephone and telegraph interception by certain law enforcement officers upon the issuance of warrants or ex parte court orders. The absence of such constitutional or statutory law in Pennsylvania does not preclude the admission of evidence obtained by wire tapping by an officer in a criminal case.

It seems that if the evidence obtained by wire tapping should be considered without express authority of law in Pennsylvania, it would be admissible under certain circumstances. It has long been the rule in Pennsylvania that evidence illegally obtained is admissible. In the recent case of Commonwealth v. Montanero, 173 Pa. Superior Ct. 133 (1953), the defendant was prosecuted for pool-selling and bookmaking. His premises were searched under a conceded, defective search warrant and an Armstrong racing sheet and four torn sheets of paper bearing pencil markings thereon were seized. The papers seized were ordered returned to the defendant, but it was held that secondary evidence thereof was admissible. At page 135 of the opinion the court said: "Nor will the fact of their illegal seizure exclude evidence of their contents. In Com. v. Agoston, 364 Pa. 464, 484, 72 A. 2d 575, the Supreme Court, speaking through Maxey, C. J., and quoting 8 Wigmore on Evidence, Section 3183, flatly held: 'It has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has

been enabled to obtain the evidence', citing Com. v. Connolly, 290 Pa. 181, 138 A. 682, and Com. v. Hunsinger, 290 Pa. 185, 138 A. 683. These authorities have been followed in a long line of cases which uniformly hold that the admissibility of evidence is not affected by the illegal methods by which it was procured."

Defendant contends that the interception of telephone conversations is in direct conflict with Article I, Section VIII of the Constitution of Pennsylvania. We cannot agree with this contention if the interception of a telephone conversation or message is made under proper circumstances by an officer and for the detection and apprehension of criminals. As stated by Mr. Justice Sutherland in his dissenting opinion in Nardone et al. v. United States, 302 U. S. 379, 58 Supreme Court Reporter 275: "There is a manifest difference between the case of a private individual who intercepts a message from motives of curiosity or to further personal ends, and that of a responsible official engaged in the governmental duty of uncovering crime and bringing criminals to justice. . . . But to put the sworn officers of the law engaged in the detection and apprehension of organized gangs of criminals, in the same category, is to lose all sense of proportion."

The court concludes that the evidence obtained by wire tapping by an officer of the law in the instant case was properly admitted in evidence. The manner in which the wire tapping was done goes only to the weight to be given to such evidence.

There is also evidence of certain well-known racing forms and of about 68 slips or papers containing notations made by defendant in symbols relating to bets on races at the different tracks. They were found by the police in defendant's room in his hotel when it was occupied by defendant and another party. Defendant claims that all of them were used for his own private betting and not by him as a bookmaker or as a common gambler. In Commonwealth v. Stoe, 167 Pa. Superior Ct. 300, 303, a Lancaster County case, it is said: "If separately considered,

the presence of many of the articles found in the bedroom might be without significance. But these items, when considered together with all the circumstances, justified the jury in concluding that appellant occupied the premises 'with books, apparatus or paraphernalia for the purpose of recording or registering bets or wagers.' Some of the material or items of personal property could be used for various purposes, but, combined with the 91 code marked slips and the correlating racing publications, they constitute books, apparatus or paraphernalia for a purpose prohibited by the Act."

Relative to the charge of being a common gambler, the court in its charge to the jury said: "The defendant is also charged with being a common gambler, and the law in that respect is that whoever maintains any gambling device or apparatus, to win or gain money or other property of value or aids, assists or permits others to do the same, or engages in gambling for a livelihood, or is without any fixed residence, and in the habit or practice of gambling, is what is known in law as a common gambler, and to be such is a violation of the law of this state. It is not any specific act of gambling. Gambling of itself is not a crime in Pennsylvania. The term 'common gambler' rather describes a status or way of life or means of obtaining a livelihood." In Commonwealth v. Aversano, 67 D. & C. 371, it is said: "What is the corpus delicti in the offense of being a common gambler? It is not any specific act of gambling, for gambling of itself is not a crime in Pennsylvania. The term 'common gambler' rather describes a status, a way of life, a means of obtaining a livelihood." In that case the defendant was a patron caught in a raid on a gambling establishment. Large sums of money were found on his person and loaded in the trunk of his Cadillac automobile were two slot machines. Defendant had for several years no gainful occupation. The court said: "Any one of these things, with the possible exception of possession of the slot machines, would not be enough to brand defendant as a common gambler, but taken all together, without any ex-

planation, were enough to warrant a finding that defendant engaged in gambling for a livelihood, and was in the habit or practice of gambling."

In the instant case defendant was engaged in continuous gambling. He testified that it was for his own personal benefit and pleasure. However, the jury found otherwise. City Detective Farkas testified in detail as to certain telephone conversations between defendant and Richard Manduchi which he overheard by wire tapping. Farkas testified that bets were placed with the defendant, Isaac Chaitt. Defendant admitted calling by telephone William Armstrong eight or ten times a day for gambling results and spending about $400.00 per month on telephone tolls for his alleged gambling "hobby".

The defendant is the owner and manager of the Pennsylvania Hotel in Lancaster City, with a parking lot adjacent thereto. Defendant testified that he paid $115,000 for the property and he has a mortgage against it in the amount of $100,000. Defendant testified that his income from the hotel and from the parking lot amounts to $10,000 per year and that he receives in addition thereto $850.00 per month rental from a storeroom.

Defendant claims that the evidence is insufficient to convict him of common gambling and that there is no evidence that defendant's livelihood came from gambling, but from his hotel business. The verdict of the jury justifies the reasonable inference that defendant's income derived from illegal gambling contributed to his livelihood. In Commonwealth v. Phillipi et al., 6 Pa. D. R. 426, it is said: "The law was passed for the express purpose of punishing men engaged in gambling for a livelihood or as one means of earning money." It was held to be sufficient if a defendant was "there for the purpose of earning or trying to earn a livelihood in connection with his other business." To hold otherwise would nullify the law as to a common gambler if he should engage in some other income-producing enterprise or use what is generally referred to as a "front".

In the instant case both charges grew out of the same series of defendant's acts of gambling. In Commonwealth v. Carr et al., 137 Pa. Superior Ct. 546, 551, the defendants were charged with and found guilty of (1) setting up and establishing a gambling house; (2) bookmaking; (3) conspiracy to set up and maintain gambling devices and (4) conspiracy to engage in bookmaking. The court said: "If the law and the evidence support a judgment on any count of an indictment, since the sentence imposed was less than that which might have been lawfully given under any single count, the judgment on the general verdict on that indictment will be affirmed." Accord: Commonwealth v. Gauci, 152 Pa. Superior Ct. 437. In Commonwealth v. Bitler, 133 Pa. Superior Ct. 268, 281, Keller, P. J., said: "We have frequently refused to disturb judgment of sentence for larceny, or receiving stolen goods, where the verdict found the defendant guilty on both counts, provided the sentence was imposed on only one count." This case was cited with approval in Commonwealth v. Van Buskirk et al., 155 Pa. Superior Ct. 613, 626.

Twelve reasons have been assigned for a new trial. The first four are general, that the verdict was against the law, the evidence, the weight of the evidence and the charge of the court. The fifth, sixth and seventh reasons relate to the admission of evidence obtained by wire tapping. The eighth, ninth, tenth, eleventh and twelfth reasons relate to the court's overruling defendant's motion for a directed verdict of not guilty on both charges and in overruling the demurrer to the evidence on both charges and in overruling defendant's points for binding instructions. All the reasons assigned for a new trial are found to be insufficient to warrant the granting of a new trial.

And now, July 17, 1953, the rule for a new trial on both charges is discharged.

By THE COURT:

OLIVER S. SCHAEFFER,
P. J.

ORDER OF THE LANCASTER COUNTY, PENNSYLVANIA, COURT OF QUARTER SESSIONS.

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By THE COURT:

OLIVER S. SCHAEFFER,
P. J.

FINAL JUDGMENT OF SENTENCE OF THE LANCASTER COUNTY, PENNSYLVANIA, COURT OF QUARTER SESSIONS.

August 28, 1953, the Court sentenced the defendant, Isaac Chaitt, on Indictment No. 6, December Term, 1952, on the count of Bookmaking, "to pay to the Commonwealth for the use of the County of Lancaster a fine of $300.00, pay costs of prosecution and undergo imprisonment in the Lancaster County Prison for a period of 3 months.

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA.

Opinion by Woodside, J.

FILED: JULY 13, 1954.

The only question involved in this appeal is whether the testimony of local police officers relating conversations of the accused heard through tapping a telephone wire is admissible against one charged with crime in a court of this Commonwealth. We think it is.

The appellant was tried before a jury in the Quarter Sessions Court of Lancaster County on the charges of bookmaking and being a common gambler.

At the trial the Commonwealth produced the testimony of two police officers of the City of Lancaster. It appeared from their testimony that Richard Manduchi had an apartment at 715 N. Duke Street, Lancaster. The owner of the apartment house, at the request of the police officers, took them into the basement by a rear entrance and showed them the inside telephone terminal box. From it the officers followed the wires to where they led up through the floor to Manduchi's apartment. The officers then tapped these wires and during the afternoons of the next several days listened to the telephone conversations.

While the officers were listening Manduchi received a number of telephone calls from different persons placing horse racing bets with him. Manduchi would then telephone the appellant, Isaac Chaitt, and sometimes make the same bet with the appellant which had been made with him, and at other times he would make what is referred to as "lay off" bets.[1] There was some evidence that Manduchi and the appellant were partners.

1. As insurance companies often reinsure in other companies risks which they consider too large to carry themselves, so, we are told, bookmakers and professional number bankers who get too many bets on one horse or number, or get too large a bet, frequently "sell"

Timely objections were made to the admission of this evidence on the grounds that it violated the 4th, 5th, and 14th Amendments to the Constitution of the United States, Article 1, Section 8 of the Pennsylvania Constitution[2] and the Federal Communications Act of June 19, 1934, 48 Stat. 1064, 47 U. S. C. A. 151 et seq. The objections were overruled, an exception noted and the evidence admitted. The jury found appellant guilty. On motion for a new trial the court en banc upheld the admission of the testimony obtained by wire tapping. The defendant was then sentenced to fine and imprisonment on the charge of bookmaking. From this judgment he appealed.

It is conceded by the District Attorney that the evidence of telephone conversations obtained by wire tapping was a material part of the Commonwealth's case and must have had a substantial effect on the verdict of the jury. Thus, if the testimony was improperly admitted, a new trial should be granted.

The question of admitting evidence obtained by wire tapping has been a highly controversial one on which students of law and government have held divergent views and strong convictions. The subject encourages courts to divide, Congress and Legislatures to debate, law reviews to philosophize and newspapers to editorialize—frequently and often vituperatively.[3] In spite of this, the law which the Court should apply to his case is clear.

So much has been written by the courts that dicta can be found to support almost any conceivable position which a lawyer might deem advantageous to assume. The law,

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part of it to another operator. Generally, although not always, the smaller operator finds it necessary to secure a larger or wealthier operator to accept "lay off" bets from him.

2. Art. 1, Sec. 8 of the Pennsylvania Constitution and the 4th Amendment to the Federal Constitution deal with illegal search and seizure; the 5th Amendment deals with being compelled to give evidence against one's self and the 14th with due process.

3. For recent law review articles on the subject see The Yale Law Journal, April 1954. Vol. 63, No. 6, Pages 792 and 799.

however, can be best understood by examining what the courts have *held* on the subject of admitting testimony improperly obtained, and on the subject of wire tapping.

The 5th and 14th Amendments to the Constitution of the United States have no application to the facts of this case. An incriminatory telephone conversation voluntarily conducted by the accused and secretly overheard from a tapped wire does not compel the accused to be a witness against himself in violation of the 5th Amendment. Olmstead et al. v. United States, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928). Neither does the 14th Amendment prevent the admission of such testimony by state officials in a state court. Irvine v. California, 347 U. S. 128, 74 S. Ct. 381, 383, 98 L. Ed. 324 (1954).

Turning to the question of admitting evidence obtained by illegal means, we find that the common law rule, supported by many English and American cases, is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1904); Olmstead et al. v. United States, supra, p. 467; Com. v. Agoston, 364 Pa. 464, 72 A. 2d 575 (1950).

Although the Supreme Court showed an inclination to deviate from this rule in Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886) it is generally accepted that until 1914 this was the rule in every English speaking jurisdiction in the world with the exception of Iowa.[4] See Appendix in Wolf v. Colorado, 338 U. S. 25, 33, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949).

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4. See State v. Height, 117 Iowa 650, 91 N. W. 935 (1902). After pioneering in the doctrine adopted by the United States Supreme Court in the Weeks case the Iowa courts subsequently rejected this doctrine and returned to the common law rule, pointing out that "the due administration of the criminal law would be seriously hampered and in many cases entirely subverted by a strict adherence" to the rule in the Height case. See State v. Tonn, 195 Iowa 94, 191 N. W. 530, 535 (1923); State v. Rowley, 197 Iowa 977, 195 N. W. 881 (1923).

That year the Supreme Court of the United States in Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), decided that letters taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant were improperly admitted into evidence in a Federal court. This exception to the common law rule was limited to evidence obtained by federal officials, for in the same case it was held that papers and property illegally seized by policemen not acting under any claim of Federal authority were properly admitted into evidence.[5]

By 1949 only sixteen of the state courts had followed the Federal rule. Thirty-one states, including Pennsylvania, and all other English speaking jurisdictions, adhered strictly to the common law rule. See Appendix to Wolf v. Colorado, supra.

In Com. v. Dabbierio, 290 Pa. 174, 138 A. 679 (1927), our Supreme Court held that Article 1 Section 9 of the Pennsylvania Constitution does not forbid the receipt of evidence, on the trial of their former possessor, of articles taken under a search warrant which was wrongfully issued and served. Although admitting "the great persuasive effect to be given to the decisions of that eminent tribunal, even when they are not binding" upon it, our Supreme Court nevertheless rejected the reasoning of the Weeks case and like the vast majority of other jurisdictions adhered to the common law rule. Page 179.

In Com. v. Agoston, supra, page 484, our Supreme Court again followed what had "long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence."

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5. Following this rule, private papers stolen from the accused by private citizens and delivered to a law officer of the United States were held admissible against him in federal court. Burdeau v. McDowell, 256 United States 465, 476, 41 S. Ct. 574, 65 L. Ed. 1084 (1921).

As late as 1953 our own Court in Com. v. Montanero, 173 Pa. Superior Ct. 133, 96 A. 2d 178 (1953) held that the admissibility of evidence is not affected by the illegal methods by which it was procured.

In that case Judge Reno again considered the Federal rule and said:

> "Appellee relies upon cases decided by the United States Supreme Court, such as Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524; Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, and Weeks v. U. S., 232 U. S. 383, 34 S. Ct. 341. These cases and their cogeners lay down rules of evidence which apply only in the Federal courts. They are not binding upon the courts of this State and have been expressly repudiated by them. Com. v. Dabbierio, supra, Com. v. Schwartz, supra. Moreover, the United States Supreme Court has held that its rule which excludes illegally obtained evidence is not applicable to trials in state courts, Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, and has recognized our Dabbierio case as an authoritative pronouncement of Pennsylvania's posture." Page 136.

Now let us turn to the question of whether secretly taping a telephone wire is a violation of a person's rights as guaranteed by the 4th Amendment. It is not.

The Supreme Court of the United States held that wire tapping did not amount to a search or seizure within the meaning of the 4th Amendment, pointing out that "The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects." The language of the Amendment, the Court held, cannot be stretched and expanded to include telephone wires reaching to the whole world from defendant's house or office. Olmstead v. United States, supra. In that case as here "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and

that only. There was no entry of the houses or offices of the defendants." Page 464.

In the Olmstead case the court had suggested that Congress could protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials by direct legislation, and thus depart from the common law rule of evidence. Page 465. Immediately thereafter Congressional Committees investigated this matter, but session after session Congress rejected all efforts to change the law.

When the Federal Communications Act of 1934, supra, passed Congress there was contained in it a provision (Section 605) which the Supreme Court later said did change the federal rule of evidence on admitting conversations obtained by wire tapping.

This Act was passed for the purpose of transferring jurisdiction over radio and wire communications to the newly constituted Federal Communications Commission. The language of Section 605, which we shall discuss later, was borrowed from the Radio Act of 1927. This practically identical provision was in the Radio Act even before the Olmstead case was decided. See Dissent of Justice Brandeis, footnote 13 page 481.

During the passage of the Communications Act no mention was made of any change in the law relating to wire tapping or the admission of evidence obtained thereby. In fact, Congressman Sam Rayburn in reporting for the Committee on Intrastate and Foreign Commerce which had the bill, said to the Members of the House of Representatives on June 2, 1934:

> "I think it is also a fair statement to make that the bill as a whole does not change existing law, not only with reference to radio but with reference to telegraph, telephone, and cable, except in the transfer of the jurisdiction and such minor amendments as to make that transfer effective." 73rd Congress, Second Session, Congressional Record Vol. 78 part 10, page 10313.

Thus Congress was told that the bill did not change existing law with reference to telephone except in the transfer of jurisdiction.

During the entire 1934 Session Congress did not discuss wire tapping. See Nardone v. United States, 302 U. S. 379, 382, 58 S. Ct. 275, 82 L. Ed. 314 (1937).

In light of the refusal of Congress to enact legislation prohibiting wire tapping every time the issue was directly presented to it, and its failure to discuss the effect of the passage of the Federal Communications Act on wire tapping, the section was, indeed, what is frequently referred to in legislative parlance as a "sneak amendment."[6]

This, of course, does not affect its validity in the courts which are bound by the Act, but it substantially weakens its persuasiveness upon a court not bound by it.

The section referred to above, found in 48 Stat. 1103, 47 U. S. C. A. 605, provides, inter alia, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person;"

Section 501 penalizes willful and knowing violation by fine and imprisonment. 48 Stat. 1100, 47 U. S. C. A. 501.

The United States Supreme Court held in Nardone v. United States, supra, that in view of this section, evidence obtained by Federal agents by tapping telephone wires and

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6. It is not infrequent that important and controversial changes in statutory law, rejected whenever directly presented, are subsequently "found" in codifications or verbose acts whose main purpose is entirely foreign to the unobserved change which is subsequently discovered. As everyone familiar with legislative procedure knows, this sometimes happens by accident and sometimes by design. How often by one cause and how often by the other is anybody's guess.

Just as all efforts to secure the passage of legislation to prohibit wire tapping by Federal officials failed whenever directly submitted to Congress, so, since the Nardone case, have all efforts in Congress to legalize wire tapping also failed. The more controversial a subject is, the more likely it is that a legislative body will refuse to disturb the status quo.

intercepting interstate messages is not admissible in a criminal case in the Federal district court. The court refused to apply the rule that general language is not applicable to the sovereign.[7]

Subsequently in Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298 (1939) the court held that Section 605 prohibited the interception and divulgence of intrastate as well as interstate conversations.

Having thus held that communications intercepted by wire tapping were not admissible in a Federal court the question was presented to the United States Supreme Court in Schwartz v. Texas, 344 U. S. 199, 73 S. Ct. 97 L. Ed. 231 (1952), whether these communications were also barred by Section 605 from use as evidence in a criminal proceeding in a state court.

The Court concluded that Congress did not intend the Section to apply to proceedings in state courts and decided that the Federal Act does not exclude such evidence in state court proceedings. The Supreme Court recognized that "This question has been many times before the state courts, and they have uniformly held that Section 605 does not apply to exclude such communications from evidence in state courts." Page 202.

Of course it has long been held that "it is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government. Fong Yue Ting v. United States, 149 U. S. 698, 729." Adams v. New York, supra, Page 599.

Reviewing the rules established by the above cited cases we find that (1) wire tapping is not an unlawful search and seizure as contemplated in the 4th Amendment; (2)

7. The court's decision in the Nardone case refusing to "sanction such conduct on the part of the Executive" (as Justice Brandeis put it in the Olmstead case) came at a time when the usual mutual confidence and understanding between the judicial and executive branches of the Federal government were at the lowest ebb of anytime during this century, as reference to the debates over the so-called "court packing bill" then pending before Congress clearly demonstrates.

even if it were a violation of the 4th Amendment, nevertheless evidence obtained by unlawful search and seizure is admissible in the courts of Pennsylvania; (3) wire tapping and divulging what was thereby overheard violates Section 605 of the Federal Communications Act; (4) this provision makes inadmissible in a Federal court evidence obtained by Federal officials tapping telephone wires; (5) this provision does not deny to the state courts the right to admit evidence obtained by tapping telephone wires.

The appellant does not direct his argument against these rules, and what has been reviewed above is necessary only as background to the full consideration of the issue before us. Appellant concedes that the above Act of Congress does not promulgate a rule of evidence binding upon state courts, and that we are free to formulate our own rule of evidence on the issue.

The contention of the appellant, as ably presented by his counsel, is that not only is the tapping of the wire unlawful, but the testifying in court of what was heard is a violation of the Federal Act, because the witness is thereby "divulging" the communication which he intercepted.[8]

Therefore, it is contended we should promulgate a rule of evidence applicable to the courts of this state that any evidence obtained by tapping a telephone wire should not be admissible.

It is argued that the common law rule, so uniformly applied in this state, holding that the admissibility of evidence is not affected by the illegality of the means by which it was obtained, has no relevancy, because here it is the divulging of the information in court and not the prior unlawful obtaining of it which is involved. It is suggested that in the illegal search and seizure cases the witness is merely telling of a crime previously committed, but in this case the witness is committing a crime by the telling.

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8. The Act says "no person shall intercept any communication *and* divulge the contents," *etc.* (Emphasis supplied).

It is argued that "a police officer violates the Federal Communications Act when he testified with respect to a telephone conversation intercepted by means of a wire tap, and the court by permitting such testimony, thereby encourages, condones, and sanctions the violation of a federal statute committed in its very presence." It is even argued that "the court participates in the violation and takes part in the commission of an act which is made a crime by federal statute."

This assumes that it is a crime for a witness to testify in a state court concerning a conversation he overheard through a tapped telephone wire. No court ever held this to be a crime. We are not inclined to act upon the assumption that it is.

True in Nardone v. United States, supra, the court held that the Federal Statute included within its sweep Federal officers testifying in a Federal court, but no case has been called to our attention where a court, Federal or state, high or low, took the additional step and held that it prohibited state officials from testifying in a state court.

True also there is language in Schwartz v. Texas, supra, from which it could be argued that a witness might be prosecuted for so testifying, but that case *held* that the Act of Congress does not exclude evidence obtained by wire tapping sought to be divulged in a state court. *It decided that Congress did not intend to prohibit the admission of this testimony by a state official in a state court. How then can counsel argue or court conclude that Congress intended to make a crime of what it did not intend to prohibit?*

There is a rule of law, too frequently stated to need citation, that general words of a statute do not include the sovereign or affect its rights unless the construction be clear and indisputable. The Supreme Court's refusal to apply this rule to Federal agents testifying in a Federal court does not mean it is not applicable to state officials testifying in a state court. Federal officials, in a sense creations

of Congress, are naturally subject to its expressed policy to a much greater extent than state officials.

In the Schwartz case the Supreme Court held that section 605, supra, is not applicable to state officials testifying in a state court. It follows, therefore, that the term "no person" in the provision "no person shall . . . divulge" does not include state officials.

State officials are subject to Federal prosecution for *obtaining* evidence in violation of Federal law even though the evidence is admissible in court. Of course, telling in court of a crime previously committed does not exempt the witness from prosecution. But it does not follow that because a person can be prosecuted for illegally obtaining evidence, he can also be prosecuted for divulging a telephone conversation while testifying in court. There is a distinction between these two situations, which the appellant argues is important enough that what the law is as to one situation should not be the law as to the other.

As the expression "no person shall divulge" does not apply to a state official while a witness in a state court, we think such official cannot be prosecuted for divulging such conversation in court. Unless we assume it is a crime for him to so testify, the argument of the appellant falls.

But there are many other reasons why we should reject the appellant's contention. Let us see what an anomaly we would create in the law by adopting the suggested rule of evidence.

We would be holding that the law protects by a rule of evidence a right created by an act of Congress while it does not protect by a rule of evidence a right created by both the Constitution of the United States and the Constitution of Pennsylvania.

By long established and almost universally applied law we admit into evidence papers obtained by violation of the accused's constitutional rights, yet because of a right of the accused inferred from an Act of Congress, held not applicable to State Court procedures, we are asked to refuse

to permit a witness to divulge information obtained by wire tapping.

Let us examine the probable consequences of such holding by us. At least one branch of Congress has found the present law relating to wire tapping unsatisfactory, for at this writing the House has sent to the Senate a bill to permit Federal agents to tap telephone wires within certain limitations, and to use the evidence thus obtained.

If we promulgate the rule of evidence urged upon us by appellant, what will happen to it if Congress changes the law? Are our courts to continue to follow a Federal rule so strict that the Federal Government itself found it unsatisfactory? Or would our courts then be asked to bend our rule to comply with all the practices and procedures set forth in the amended Federal act to determine when, where, how and by whom it would be legal to tap wires? Are the state courts to sway like a reed to the winds of Congressional whims?

Of course, our courts could hardly bend the rule to meet all the requirements of a Congressional Amendment without legislating, and thus infringing upon the exclusive powers of our General Assembly. States cannot "adopt" Congressional Acts, held by the Supreme Court of the United States not applicable to us, without wiping out all semblance of independent sovereignty.

Suppose we would say wire tapping evidence may not be admitted because of a Federal Act, and thereafter the Pennsylvania General Assembly says, as New York State did, it can be admitted, either without limitation or with limitations different than Congress might by then have prescribed. Thus after having formulated a court rule on the basis of an Act of Congress we might find the rule quite irreconcilable with future action of both Congress and our own Legislature, not to mention the fact that Acts of Congress and our General Assembly might well also be irreconcilable. The ultimate result of adopting the rule advocated by appellant would be to create confusion confounded. It

would develop into a District Attorney's nightmare and a defense lawyer's paradise.

The criminal jurisprudence of one sovereign should not be under control of another sovereign, and to permit Congress to prescribe the rules of evidence for our courts would do just that. See opinion by Chief Justice Taney in United States v. Reid, 53 United States 361, 363, 13 L. Ed. 1023 (1851); Olmstead v. United States, supra, Page 469.

Turning to precedent we find it, too, is against appellant's contention. The precise question here presented was decided, if not precisely argued, in the highest courts of New York, Maryland, California and Texas. See People v. Stemmer, 298 N. Y. 728, 83 N. E. 2d 141 (1948); Leon v. State, 180 Md. 279, 23 A. 2d 706 (1942) People v. Channell, 107 Cal. App. 2d 192, 236 P. 2d 654 (1951).

The appellant claims these courts all missed the point, because they did not deal with the "crime in court" theory which he advanced, and with which we have dealt above. Nevertheless, they passed upon the precise question here raised, and uniformly decided that evidence obtained by wire tapping was admissible in a state court in spite of Section 605 of the Communications Act, supra.

Our attention has been called to no case which has held otherwise.

This is the first time this question has been brought before an Appellate Court in Pennsylvania, and for this reason we are dealing rather fully with what might otherwise have been disposed of much more briefly.

The question was before the Allegheny County Court. It decided evidence obtained by wire tapping was admissible against the accused in a court of this Commonwealth. See Com. v. Charpentier, 99 P. L. J. 219, 78 D. & C. 389 (1951).

Pennsylvania has never made it a crime for a public officer to tap a telephone wire to obtain evidence. Were we to adopt a rule providing that evidence so obtained

would not be admissible against an accused, we would seriously handicap law enforcement in this Commonwealth.

How many secrets vital to our national defense may have passed into unfriendly hands because of the federal limitation on wire tapping no man will ever know. But of this we can be certain, the task of the law enforcement officer has been made more difficult thereby.

To suggest that tapping telephone wires by police officers is "dirty business" is beside the point. Shooting a man is "dirty business" too, but we approve of our police officers carrying loaded revolvers. Police officers cannot apprehend the enemies of society while carrying "The Age of Chivalry" in one hand and Emily Post's latest edition on "Etiquette" in the other.

Neither are we impressed by the suggestion that evidence obtained by wire tapping should be admitted only when the accused faces one of the more serious crimes. It is well known that gambling, although a lesser crime, is the lifeblood of the organized underworld. Gangsters and racketeers, with all the varied evils which they inflict upon a community, would be far less powerful and influential without the income realized from organized gambling.

It is interesting to note, although not important to the determination of this case, that the telephone was the very implement through which the offense was committed by the appellant in this case.

It is not the most pleasant thing to realize that some unknown person may be listening to your telephone conversations,[9] but neither is it pleasant to contemplate that

9. Many telephone subscribers in the rural sections of this Commonwealth and elsewhere have never known the privacy on a telephone that some people consider to be a fundamental right. Those on a multiparty rural line know that their neighbors, at times by accident and maybe at times by design, overhear their conversations and instantly recognize their voices. "Central", as the small town "operator" is called, almost of necessity "knows everything about everybody" in the community. This not only restricts freedom of indiscretion, but is inconvenient, annoying and, at times, exasperating even to the pure

the enemies of society may be planning over the telephone to kidnap your child, or burglarize your home, or rob your bank, or that they are carrying on over the telephone a racket that tends to corrupt your officials, bribe your athletes and cheat your government while we say to our officers—"Don't listen in—it isn't nice."

If this policy of this Commonwealth is to be changed so that this risk is to be imposed upon our people, it is not for the courts to do it with a rule of evidence.

Judgment affirmed.

Dissenting opinion by Gunther, J.

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in heart. But that this situation has its advantages as well as its disadvantages is known to those who have lived with it. Those who have never had any such experience can read about it in such articles as "Good-Bye, Central" in October 1952 Reader's Digest, and "The Dial v. Mildred" in The New York Times Magazine section of July 4, 1954.

DISSENTING OPINION BY GUNTHER, J. OF THE SUPERIOR COURT OF PENNSYLVANIA.

(Filed July 13, 1954.)

The appellant in this case was convicted on two indictments, one of which charged the offense of bookmaking and the other the charge of being a common gambler. The only question involved in this appeal is whether or not testimony concerning a telephone conversation between the appellant and another person, which was intercepted by means of wire tapping by the police officers of the City of Lancaster, should have been admitted in evidence. The trial court allowed evidence thus obtained to be admitted over appellant's objection. The Commonwealth concedes that this evidence formed a material part of its case and that if this admission was improper, a new trial should be granted.

The common law rule was that the admissibility of evidence did not depend upon its being legally obtained, and following this rule, the Pennsylvania courts have repeatedly sustained convictions based upon evidence procured by police officers whose conduct was violative of the search and seizure provision of the Fourth Amendment. *Commonwealth v. Montanero,* 173 Pa. Superior Ct. 133, 96 A. 2d 178. The majority of state jurisdictions have likewise held that evidence thus illegally obtained was nevertheless admissible, the United States Supreme Court in the case of *Wolf v. Colorado,* 338 U. S. 25, 69 S. Ct. 1359, 93 L. E. 1782, pointing out that 30 of the 47 state courts which have passed on this question have allowed the admission of such evidence and that 17 have rejected it. The U. S. Supreme Court in the case of *Weeks v. United States,* 232 U. S. 383, 34 S. Ct. 341, 58 L. E. 652, established the principle, since then law in all of the United States courts, that evidence obtained by means which would constitute an unlawful search and seizure under the Fourth Amendment is

inadmissible in a Federal Court. But, as has been stated, this decision has not been followed in the majority of state courts, trying state offenses.

Evidence obtained by wire tapping has been held by the Supreme Court not to be violative of the Fourth Amendment, the Court stating that this Amendment protected against only an unlawful physical entry against the abstraction of tangible property. *Olmstead v. United States*, 277 U. S. 438, 48 S. Ct. 564, 72 L. E. 944. However, this decision proved generally unpopular with the result that in several subsequent sessions of Congress, bills were introduced designed to prohibit the practice of wire tapping. Finally in the Federal Communications Act of June 19, 1934, 48 Stat. 1103, 47 U. S. C. A. 605, there was contained a provision (Section 605) which prohibited the interception of any communication by wire and likewise prohibited the divulging or publishing of the contents of such communication. In the leading case of *Nardone v. U. S.*, 302 U. S. 379, 58 S. Ct. 275, 82 L. E. 314, it was held that Federal officers were included in this prohibition and that the words "divulge and publish" applied to testimony given before a court. The Court in the last cited case reversed a conviction based on evidence obtained by wire tapping. Furthermore, in the case of *Weiss v. U. S.*, 308 U. S. 321, 60 S. Ct. 269, 84 L. E. 298, it was held that the cited section of the Act applies to intrastate as well as to interstate communications. These decisions have established the law upon this question for all trials in Federal District courts.

The Supreme Court, however, has been very careful to point out that it does not intend to establish a rule of evidence which shall be binding upon State Courts conducting trials involving state offenses. Thus it was stated in the case of *Schwartz v. State of Texas*, 344 U. S. 199, 73 S. Ct. 232, 97 L. E. 157: "Indeed, evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is none the less admissible in a state

court, Wolf v. Colorado, 338 U. S. 25, while such evidence, if obtained by a federal officer, would be clearly inadmissible in a federal court. Weeks United States, 232 U. S. 383. The problem under § 605 is somewhat different because the introduction of the intercepted communication would itself be a violation of the statute, but in the absence of an expression by Congress, this is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts."

Despite the prohibition contained in the Federal Communications Act and the *Nardone* decision, the courts of several jurisdictions accordingly have admitted evidence so obtained. The State of New York for instance has by Statute provided for the admissibility of evidence obtained by wire tapping, providing, however, certain safeguards against its abuse. The New York Statute requires that an application be made to the Court by the Attorney General, the District Attorney, or a high ranking police officer for permission to intercept telephone messages. Cause must be shown and the particular conversations sought to be intercepted must be detailed. Pennsylvania in common with many other states has no such regulatory Statute, and should it now be held that wire tapping evidence is admissible, it must be admitted indiscriminately and without reserve.

Indeed, this question has never been passed upon by the Appellate Courts of this State the sole Pennsylvania decision being that of *Commonwealth v. Charpentier,* in the Court of Oyer and Terminer of Allegheny County, in which Judge Soffel in an opinion reported at 99 PLJ 219 (78 D & C 389) held such evidence to be admissible. In this opinion, the learned Judge pointed out that the United States Supreme Court has scrupulously refrained from establishing a rule of evidence which would be binding upon State Courts, and hence she found no valid reason to exclude the testimony.

Notwithstanding this decision, the Appellate Courts of this State, if they deem it in the interest of justice and good morals, may very well follow the suggestion contained in the case of *Schwartz v. Texas*, supra, and exclude such evidence in obedience to the strong public policy enunciated in Section 605 of the Act and in the decisions of the United States Courts. There being no prior Pennsylvania appellate decisions upon this point, our courts are not bound by the rule of stare decisis, as they are as regards the admissibility of evidence obtained by an illegal search or seizure.

There is a clear distinction between the two types of cases and the prior decisions of the courts of this state in the latter field should not be considered as precedents in disposing of the present case. An illegal search or seizure is open and notorious and can readily be redressed, whereas the interference with a person's privacy of conversation is necessarily secret and unknown to the person affected. His conversation can be monitored for months without his knowledge. He is therefore not in a position to invoke official machinery to protect himself. As pointed out in a recent article in 52 Columbia Law Review, page 165, there has been a great increase in the use of wire tapping apparatus, not alone by public officers in serious cases, but by private persons conducting private investigations such as are involved in labor disputes and domestic relations cases. Wire tapping is done not only by the police, but by government agencies, legislative committees, political organizations, law firms, and private detective offices. In a great majority of cases, unless the desired information is obtained, the victims have been completely unaware that every detail of their private lives has been bared to some person or group with a hostile interest.

Perhaps one of the most precious incidents of our liberty is the reasonable right of privacy and nothing can be more intolerable than to realize that our most intimate conversations are being exposed to the scrutiny of outside persons, either public or private.

It is not determinative that the motives of those who indulge in this practice are sincere. Mr. Justice BRANDEIS stated in his dissent in the *Olmstead* case, supra, "as a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared to wire tapping" (page 476). "It is better that a few criminals escape than that the privacy of all the people be exposed to the agents of the government who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts" (page 479). "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding" (page 479). Mr. Justice HOLMES in the same case referred to wire tapping as a "dirty business."

It is my opinion that while this question is still open for decision, our courts should take a sound not an unsound unrealistic American position and refuse to admit evidence obtained from such a dubious source. Perhaps a regulatory Statute such as exists in New York might keep this practice within bounds. But in the absence of regulation of any sort, the knowledge that testimony obtained in violation of the Federal Statute will nevertheless be honored by Pennsylvania courts must encourage a widespread and irresponsible resort to this questionable technique, and a consequent disrespect for law.

It is idle to say that the victim has his remedy either by civil action or by instituting a prosecution under the Federal Statute. As has been pointed out, one who has been subjected to wire tapping can rarely know the extent or duration of such subjection. Again, damages to an intangible right are difficult to prove, and more difficult to recover. Insofar as the criminal remedy is concerned, this practice has been so widespread, even in the offices of the government, that a conviction would be practically impossible to obtain.

The world has been shocked by the judicial methods employed in the last few years in the totalitarian govern-

ments of Europe, both in the obtaining of evidence and in the actual trial of cases. It is generally reported that in Nazi Germany prior to its defeat, and in Soviet Russia at the present time, there has been a complete lack of personal privacy and of the normal confidence and intimacy of personal relationships, and that instead a universal suspicion everywhere prevails. It is probably far fetched to compare such conditions with the frankness and freedom of expression which is characteristic of this country, but nevertheless it is important that we should exhibit to the world a complete contrast to totalitarian methods, and that as we reject their concept of government, we likewise reject any practice of espionage which is a natural characteristic of their type of thought.

The offenses with which this defendant was charged are not heinous crimes. They are instead in the nature of malum prohibitum. Perhaps extraordinary methods may be necessary in the detection and punishment of crimes of great social significance even though not justifiable in cases such as the present. Judge Learned Hand in the case of *United States v. Coplon*, 185 F. 2d 629, suggests that a distinction should be made as to permitting wire tapping evidence in the trial of minor misdemeanors and in the trial of serious felonies. He states in his opinion at page 640 "... and perhaps it would be desirable to set limits—as for example—cases of espionage, sabotage, kidnapping, extortion, and in general, investigations involving national security and defense—to the immunity from 'wire tapping' of those who are shown by independent evidence to be probably guilty of crime."

Considering the widespread abuse which has already arisen from unrestricted wire tapping, and considering the lack of statutory safeguards in this Commonwealth and the nature of the present offense, it is my opinion that this conviction should be reversed.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Filed March 14, 1955.

HORACE STERN, *C. J.*

This case is concerned solely with the question of the admissibility, in a criminal prosecution, of evidence obtained by the interception of telephonic communications,—a process colloquially known as "wire tapping."

Defendant, Isaac Chaitt, was indicted, tried and convicted on charges of bookmaking and being a common gambler; he was sentenced to imprisonment and to pay a fine on the charge of bookmaking and sentence was suspended on the common gambler charge.

The principal evidence adduced by the Commonwealth in support of the bookmaking charge consisted of certain telephone conversations between defendant and one Manduchi which were intercepted by two police officers of the City of Lancaster who had placed a tap on the telephone wire leading into Manduchi's apartment. These officers testified, over objection, as to the contents of the conversations they thus overheard and which revealed that defendant received and accepted horse race bets from Manduchi. The latter's apartment was at 715 North Duke Street, Lancaster, and the telephone calls were from there to defendant's apartment at 122 North Queen Street, also in that city. The court refused defendant's motion for a new trial and the Superior Court affirmed the judgment (176 Pa. Superior Ct. 318, 107 A. 2d 214). From that affirmance we allowed the present appeal. It is conceded by the Commonwealth that if the testimony of the officers was improperly admitted defendant would have been, and now is, entitled to a new trial.

At the outset it must be understood that we are not here concerned with the much controverted question as to whether there is any imperative need for wire tapping for

the detection and prosecution of crime, or, even if such a need exists, whether it is outweighed by the iniquity of wire tapping from a purely ethical and social standpoint and by its impairment of the right of privacy and therefore whether it should be permitted or whether it should be banned by the laws of this Commonwealth. That question is one of policy to be determined by the legislature. All that WE ***are called upon to decide is in regard to a rule of evidence, namely, whether testimony which in itself is relevant to the determination of a defendant's guilt or innocence should nevertheless be rejected if it was secured in an allegedly improper manner.***

We start with the fundamental principle of the common law that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. That rule, which has persisted uninterruptedly in the several jurisdictions of the United Kingdom and the British Commonwealth of Nations and in an overwhelming number of the States which have had occasion to consider the question, has also been firmly entrenched in the decisions of the appellate courts of our own Commonwealth.[1]

The Supreme Court of the United States has, through a course of decisions,[2] established as the law for the federal courts that, in a federal prosecution, the Fourth Amend-

1. *Commonwealth v. Dabbierio,* 290 Pa. 174, 178-180, 138 A. 679, 681; *Commonwealth v. Hunsinger,* 290 Pa. 185, 138 A. 683; *Commonwealth v. Agoston,* 364 Pa. 464, 484, 485, 72 A. 2d 575, 585, 586; *Commonwealth v. Holgate,* 63 Pa. Superior Ct. 246, 254, 255; *Commonwealth v. Vigliotti,* 75 Pa. Superior Ct. 366, 378; *Commonwealth v. Grasse,* 80 Pa. Superior Ct. 480; *Commonwealth v. Rubin,* 82 Pa. Superior Ct. 315, 327; *Commonwealth v. Schwartz,* 82 Pa. Superior Ct. 369, 377, 378; *Commonwealth v. Dugan,* 143 Pa. Superior Ct. 383, 18 A. 2d 84; *Commonwealth v. Montanero,* 173 Pa. Superior Ct. 133, 96 A. 2d 178.

2. For example: *Boyd v. United States,* 116 U. S. 616; *Weeks v. United States,* 232 U. S. 383; *Silverthorne Lumber Co. Inc. v. United States,* 251 U. S. 385; *Gouled v. United States,* 255 U. S. 298; *Byars v. United States,* 273 U. S. 28; *Lustig v. United States,* 338 U. S. 74.

ment bars the use of evidence secured through an illegal search and seizure by federal agents. On the other hand, however, it has definitely held that this ruling does not apply to prosecutions in a State court for a State crime: *Wolf v. Colorado*, 338 U. S. 25, nor where the illegal search and seizure has been made by anyone other than a federal officer acting under a claim of federal authority: *Weeks v. United States*, 232 U. S. 383, 398; *Burdeau v. McDowell*, 256 U. S. 465; *Feldman v. United States*, 322 U. S. 487, 490, 492; *Irvine v. California*, 347 U. S. 128, 136; *Serio v. United States*, 203 F. 2d 576.

With this background in mind we proceed to a consideration of the present question in regard to wire tapping, and in that connection the first point to be noted is that wire tapping is not a violation of the Fourth Amendment of the Constitution of the United States since the searches and seizures to which that Amendment relates are only of *material* things,—one's person, house, papers or effects. Therefore the interception of telephonic communications is not illegal nor are the overheard conversations inadmissible in evidence unless prohibited by statute: *Olmstead v. United States*, 277 U. S. 438, 464-468. It is by Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1103, 47 U. S. C. A. § 605, that such a prohibition was effected. That Section provides in substance that no person receiving or transmitting, or assisting in receiving or transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the contents thereof to any person other than the addressee, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto, and no person having become acquainted with the contents of the same, knowing that such information was so obtained, shall divulge or publish the contents thereof or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. These provisions, therefore, prohibit employes

of communication agencies from divulging any interstate or foreign communications. But the portion of the Section from which the present problem arises is as follows: "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

Two questions soon arose as to the scope of this provision. The first was whether the phrase "no person" embraced federal agents engaged in the detection of crime, and whether "divulging" included the giving of testimony in a federal court as to the contents of an intercepted communication. In *Nardone v. United States*, 302 U. S. 379, it was argued that such general words as "no person" should not be held to include the sovereign and apply to federal officers, but the court held to the contrary and also that the prohibition against divulging the contents of intercepted messages banned the giving of testimony in regard thereto in a federal court.

The second question was whether the prohibition against interception applied to intrastate as well as interstate and foreign communications. In *Weiss v. United States*, 308 U. S. 321, a policeman in New York City acting under instructions of a United States Post Office Inspector, tapped telephone wires over a period of months; the intercepted messages consisted of both intrastate and interstate communications. The court stated that, since Congress had power, when necessary for the protection of interstate commerce, to regulate intrastate transactions, there was no constitutional requirement that the scope of this statute be limited so as to exclude intrastate communications, and accordingly it held that *none* of the intercepted messages were admissible in evidence in a criminal prosecution in the Federal court.

In the present case there were *no* interstate communications, all the telephoning between defendant and Manduchi taking place within the City of Lancaster. There may be

some room to doubt, therefore, whether the power of Congress to regulate interstate commerce extends to such a situation, or, if so, whether the decision in the *Weiss* case was intended to be broad enough to include the interception of purely local messages. Be that as it may, however, the more important question is whether State agents engaged in the detection of a State crime and testifying in a State court are included within the intended scope of Section 605 of the Act. It is the contention of appellant that they *are* so included and that therefore they not only commit a crime when they *intercept* a communication but an additional crime when they *divulge* it by testimony in court; accordingly he argues that for the court to allow them to give such testimony is practically to sanction and condone the commission of a criminal offense in its very presence, and therefore, even though their testimony be relevant to the determination of the guilt or innocence of the person on trial, it should not be received under such circumstances. Appellant would thus distinguish the search and seizure cases previously referred to on the ground that there the witness merely testified to the information gained by a crime already committed but did not commit another crime in and through the very act of testifying.

In our opinion Section 605 of the Act was not intended to, and does not, relate to the divulging of the contents of intercepted communications by State agents testifying in the criminal prosecution of a State crime in a State court. In *Schwartz v. Texas*, 344 U. S. 199, it was held that the Section applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof, but does not exclude such evidence in State court proceedings. When it is borne in mind that an intention of Congress to supersede or suspend the exercise of the police powers of the States, even when it has the power to do so, is not to be implied unless its purpose to effect that result is clearly manifested, (*Reid v. Colorado*, 187 U. S. 137, 148, *Atchison, Topeka & Santa Fe Rwy. Co.*

v. Railroad Commission of California, 283 U. S. 380, 392, 393), it would seem quite incredible that Congress intended by the phraseology it employed in Section 605 to interfere with those police powers and thereby prevent the States not only from seeking to detect the commission of crime but even possibly to prevent it. It would seem likewise incredible that Congress could have intended to make it a crime for a State agent to testify in a State court to intercepted telephonic communications and thus, in effect, while on the one hand admitting the existence of the power in the States to receive such evidence, on the other making it practically impossible for such testimony to be given. And since the *Schwartz* case holds that notwithstanding the prohibition of Section 605 State agents *may* divulge the contents of intercepted communications in testimony in a State court, the inescapable inference is that the provision in that Section that "no person shall divulge" such communications do not include State agents in the phrase "no person."[3] Such interpretation is in accord with the well established rule of statutory construction that the literal terms of a statute not only may, but must be limited in their application where a consideration of the whole legislation indicates that such was the intention of the framers: *United States v. Kirby,* 7 Wallace (74 U. S.) 482, 486, 487; *Church of the Holy Trinity v. United States,* 143 U. S. 457, 459; *Guessefeldt v. McGrath, Attorney General,* 342 U. S. 308. Thus in the last-named case, where an Act of Congress provided that "no property . . . of . . . *any national* of either such country [Germany or Japan] . . . shall be returned to former owners thereof . . .," it was ruled,

3. The statement on page 201 that "the introduction of the intercepted communications would itself be a violation of the statute" is obviously dictum, not being borne out by the actual decision of the court and being inconsistent with the decision in that, if such testifying were to constitute the commission of a federal crime, the court would scarcely have decided or Congress have intended that the States were at perfect liberty to permit and even invite the breach of a federal penal statute.

notwithstanding the inclusiveness of the term *"any national"* that it should be held applicable only to *some* German "nationals," namely, those who were enemies.

Several States have held, notwithstanding Section 605 of the Federal Communications Act, that evidence procured by wire tapping was admissible in their courts, and such evidence was in fact admitted in *Leon v. State of Maryland,* 180 Md. 279, 284, sub nom. *Hubin v. State,* 23 A. 2d 706, 709; in *People v. Channell,* 107 Cal. App. 2d 192, 198, 199, 236 P. 2d 654, 657, 658; in *Harlem Check Cashing Corporation v. Bell, Superintendent of Banks,* 296 N. Y. 15, 68 N. E. 2d 854; and in *People v. Stemmer,* 298 N. Y. 728, 83 N. E. 2d 141. In the *Harlem Check Cashing Corporation* case it was said: "While these are expressions in the opinion of the court [in the *Weiss* case] which seem to go so far as to interpret the Federal statute as a substantive law forbidding all disclosure or divulgence, the decision was concerned only with the propriety of the receipt of such intercepted messages in evidence on the trial of a criminal case in a Federal court. The State of New York having provided, by Constitution and statute, certain specific methods by which it may exercise its fundamental power of gathering evidence of criminality and of prosecuting crime, it surely is not to be assumed that Congress intended to circumscribe that power unless it unequivocally indicated such an intent. A Federal statute, it is recognized, must be presumed to be limited in effect to the Federal jurisdiction and not to supersede a State's exercise of its police power unless there be a clear manifestation to the contrary." [citing cases].

The admission by the trial court of the testimony here in question was not a violation of either the Federal [4] or the State constitution, nor of any legislative enactment of the

4. *Olmstead v. United States,* 277 U. S. 438; *Feldman v. United States,* 322 U. S. 487, 490; *Wolf v. Colorado,* 338 U. S. 25; *Irvine v. California,* 347 U. S. 128, 136, *Serio v. United States,* 203 F. 2d 576, 578, and cases there cited.

Commonwealth, nor, in our opinion, of the Federal Communications Act of 1934, and no court, in the 20 years which have elapsed since the passage of that Act, has decided to the contrary.

The order of the Superior Court, affirming the judgment of the Court of Quarter Sessions of Lancaster County, is affirmed.

MR. JUSTICE MUSMANNO FILED A DISSENTING OPINION.

DISSENTING OPINION OF MUSMANNO, J. OF THE SUPREME COURT OF PENNSYLVANIA.

FILED MARCH 14, 1955

MUSMANNO, *J.*

Insofar as certain phases of human liberty are concerned, the decision of this Court today takes Pennsylvania back to 1775. Instead of a Redcoat before every door, there will be a potential spy lurking in every home to record, repeat and circulate the most guarded of communications, the most intimate of conversations and the most inviolable of confidences. That the highest tribunal in this Commonwealth should countenance a situation so opposed to the creed of freemen is to me as incomprehensible as it is deplorable. The same Founding Fathers who wrote that "No soldier shall in time of peace be quartered in any house without the consent of the Owner," also wrote that "The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated."

There was no telegraphy or telephony in 1789, or, who can doubt that those same guardians of liberty would have added to the Fourth Amendment that the right of privacy in communications by wire shall also not be violated? There is no difference in principle between a communication which is reduced to writing and one which is mechanically recorded by some other medium. If the Constitution protects the message which a citizen has committed to paper, why should it deny him protection for the same message which he commits to a wire? As no one has the right to bore through the walls of his neighbor's house to listen to his conversation, so also he has no right to draw the same information from a cable which originates in that neighbor's dwelling. Breaking into a citizen's house and taking away an article which may be used against him is but a slight invasion of privacy as compared to taking away all

his private utterances, his intimate observations, his spoken aspirations, etc., etc. Had the telephone been invented prior to 1873, I do not doubt that the Constitutional Convention which met in Philadelphia that year would have so written Section 8 of Article I of the Pennsylvania Constitution as to guarantee citizens protection from unreasonable searches regardless as to how perpetrated—by door-breaking, window-smashing, or wire-tapping. But what does not appear in Section 8 in words is certainly present in principle.

The Majority of the Court says that it is not concerned with the question of wire-tapping from "a purely ethical and social standpoint and by its impairment of the right of privacy." That may be true, but this Court still has to be concerned with the constitutional rights of the defendant. The Majority says that no constitutional right is involved on the supposition that the protections guaranteed by the Fourth Amendment are only of "*material* things."[1] What is a material thing? Is liberty non-material? Does liberty become material only when wrapped in chains? If liberty means anything it means the right to deal and converse with one's family, friends and the rest of the human race unimpeded and unhampered by officious eavesdroppers. This proposition is so self-evident that to expatiate on it is to envelope it in layers of argumentation that can only obscure its sacred and pristine truth.

In the case of Boyd v. United States, 116 U. S. 616, the Supreme Court of the United States, quoting with approval the judgment of Lord Camden in the famous case of Entick v. Carrington, 19 Howell's State Trials, 1029, said:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security . . . They apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the *privacies of life*. It is not the breaking of his

1. Emphasis by Majority.

doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, *personal liberty* and private property, where that right has never been forfeited by his conviction of some public offence—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but *any forcible and compulsory extortion of a man's own testimony* or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendment run almost into each other."[2]

In support of its proposition that the Fourth Amendment applies only to material things such as "one's person, house, papers or effects," the Majority cites Olmstead v. United States, 277 U. S. 438 (decided in *1928*) but in the light of the Federal Communications Act of *1934*, which makes of a telephone conversation a property right which cannot be taken away even by the Federal Government, the *Olmstead* case is no longer controlling. The case of Nardone v. United States, 302 U. S. 379 emphasizes that fact. Indeed Section 605 of the Federal Communications Act bears the cloak of authority of the Fourth and Fifth Amendments. Supreme Court Justice Roberts, speaking for the Court in the *Nardone* case, said:

"The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, *embodied in the Fourth and Fifth Amendments of the Constitution.*"

What is the imperative need for the drastic police measure which today gains the imprimatur of the Supreme

2. Italics throughout mine, unless otherwise indicated.

Court of Pennsylvania? What are the facts in the case which has moved the Majority of this Court to approve a practice which strikes at the very heart of the sanctity of free and untrammeled communication between and among citizens of Pennsylvania? On September 21, 1951, two police officers, Albert Farkas and Thomas Williams, descended into the basement of the apartment house at 715 North Duke Street, Lancaster, and attached a wire-tap to the telephone line serving Richard Manduchi who lived on the first floor. On that day and for the following three days these two policemen listened through their clamped-on device to conversations between Richard Manduchi and Isaac Chaitt, the defendant in this case. They heard these two men discuss race horses, baseball pitchers and football games. They heard the placing of bets of $1, $2 and $3 and $5 "round robin parlays" on horses with names such as Ham Bone, Little Colleen, Miss Ellaneous, Fighting Thru, Papa Charlie, Dandy Foot, William Tell, Knot Hole, Betsy Marie, Poocha and Under the Rug.

On September 26, 1951, Manduchi and Chaitt were arrested. Manduchi pleaded guilty to bookmaking. Chaitt pleaded not guilty to charges of bookmaking and common gambling. At the trial Farkas and Williams testified to the manner in which they applied their home-made gadget to the telephone wire. Those who believe that wire-tapping is a very complicated and difficult procedure will be astonished, not to say dismayed, to learn how simple and easy this ominous invasion of a citizen's privacy can be accomplished. Farkas testified:

> "Q. You say you made this tap, tell the court and jury how you do that.
>
> A. It is very simple, the headset that you have has two wires attached to it and possibly 50 feet of wire, 2-strand wire and the telephone wire is also a double wire. It doesn't matter which one of our two wires we tap into the terminal there, if we tap into a negative with one of our negative——

Q. What do you mean by negative?

A. All electricity runs negative and positive.

Q. What did you have to get, a negative or positive connection to connect?

A. Both.

Q. You have to attach both negative and positive, that is the reason you have two wires?

A. That is correct. All wires have a little clamp, spring clamp of metal which you place like this (indicating). It opens up and when you let it go, it clamps down and all you do is clamp one wire to one wire and take the other wire and clamp it to the second telephone wire."

How long does it take to attach this device? Two hours? An hour? Twenty minutes? Not at all. It can be attached in ten seconds! Farkas testified:

"Q. What terminal did you tap on to?

A. There is a small box in the cellar where wires come in from the outside.

Q. You attach one of the wires to that?

A. You, you attach it to the terminal point leading to the front room telephone.

Q. How long did it take you to do that?

A. *Possibly ten seconds.*"

Thus, the liberty of privacy which has been achieved through centuries of struggle may, in the hands of wilful meddlers, be lost in ten seconds.

The defendant Chaitt objected to the introduction of the conversations allegedly overheard through the wiretap but the Court overruled the objection. Chaitt was convicted on both counts. The Court sentenced him to pay a fine of $300 and undergo three months' imprisonment in the Lancaster County jail. The defendant appealed to the Superior Court which affirmed the conviction and the case has come to this Court on the granting of an allocatur.

The issue before us is a simple one. Is wire-tapping constitutionally permissible in Pennsylvania? It is the first time that this question has come before the Supreme Court of Pennsylvania so that this Court stands in the wholesome and enviable position of appraising the problem according to the fundamental principles of elemental justice without the shadow of a single binding precedent to darken any phase of the question as it falls under the light of pure reason. We here stand at the crossroads of a decision vital to the welfare of every man, woman and child in Pennsylvania.

It is certainly unnecessary in the full mellowing hour of Pennsylvania's glorious history to point out that no State in the world has been more genuinely devoted to the sacred cause of liberty—political, religious and personal liberty.

Section 1 of Article I of our Constitution declares:

> "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

One of the pursuits of happiness is privacy. The right of privacy is as much property of the individual as the land to which he holds title and the clothing he wears on his back. Justice Brandeis in his Dissenting Opinion in the case of Olmstead v. United States, 277 U.S. 438 said that the invasion of privacy by telephone is even greater than that involved in tampering with the United States mail:

> "Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's tele-

phone involves the tapping of the telephone of every other person whom he may call or who may call him. *As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.*"

The greatest joy that can be experienced by mortal man is to feel himself master of his fate,—this in small as well as in big things. Of all the precious privileges and prerogatives in the crown of happiness which every American citizen has the right to wear, none shines with greater luster and imparts more innate satisfaction and soulful contentment to the wearer than the golden, diamond-studded right to be let alone. Everything else in comparison is dross and sawdust.

Section 8 of Article I of the Pennsylvania Constitution and the Fourth Amendment to the Constitution of the United States are dedicated to this right to be let alone. But if police agents and private intermeddlers may without legal responsibility peer through keyholes, eavesdrop at the table, listen at the transom and over the telephone, and crawl under the bed, then all constitutional guarantees become meaningless aggregation of words, as disconnected as a broken necklace whose beads have scattered on the floor.

It is rudimentary political science in a republic, that so long as one is law-abiding, he is not to be disturbed, harassed or interfered with by the law. If it is said that Isaac Chaitt was not law-abiding, the answer is that the millions of law-respecting citizens should not be shorn of their constitutional guarantees merely because the police suspect that one certain person is not staying within the confines of the criminal code. The great Justice Holmes, in his Dissenting Opinion in the *Olmstead* case, supra, said:

"We must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals be detected,

> and to that end that all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, which they are the means by which the evidence is to be obtained . . . We have to choose, and for my part I think it is a less evil that some criminals should escape than that the Government should play an ignoble part."

Arrived at the crossroads to which the case at bar has taken this Court on a constitutional question, I prefer humbly to choose to stand with Justice Holmes in the determination so resolutely expressed by him that the rights of liberty on which this nation is founded shall not be violated, even by an arm of the government itself. I would rather see a petty gambler go free than that the great people of this Commonwealth should be deprived of the personal liberties forged in the fires of Lexington and Gettysburg and formulated amid the storm of debate in our legislative halls. A police department worthy of the name can and will find a way of tracking down malefactors without shaming the Constitution, the Bill of Rights and all the other immortal guarantees which have made the name of Pennsylvania one to conjure with in the great temple of liberty.

In an intelligent and responsible society a rule of proportion, not to say of humanity, obtains in the consideration of every problem, including that of how to catch the law-evader. We are reminded by the lower Court that the police officers in the case at hand were detecting crime. Does that of itself excuse the commission of another crime? Is an officer to be allowed to run down a child in his automobile because he is pursuing a felon? Is he allowed to shoot into a crowd because somewhere in the throng a pickpocket is lurking? Is he allowed to poison a reservoir on the theory that a certain fugitive from justice will drink a cupful of the infected water?

Which is more important? That Isaac Chaitt be imprisoned for three months because he accepted some bets

on horse races and a baseball game or that the people should be secure in their homes against snoopers, eavesdroppers, meddlers and Peeping Toms? Which is more important? That a horse race gambler should be punished or that the integrity of one's home be protected? That a placer of bets be stopped or that the government not be degraded by trampling on rights of liberty ever sacred to this land?

I do not exclude that, where national security is involved, agencies of government, under proper judicial supervision, should be allowed to use every method known to the science of detection to ferret out Communist conspirators, spies and saboteurs and to bring them to book for their crimes which aim at the very destruction of this nation and all the liberties with which the name of America is synonymous. There should be no limitation of action where the Communist conspiracy is involved, because it seeks to thrust a knife against the very jugular vein of civilization.

However, that is not this case. This case has to do with a couple of petty gamblers; and by the affirmance of the conviction of an offense which calls for a three-months' jail sentence, police officers, detectives and private sleuths in every city, village, town and hamlet may repeat in the basement of every home in Pennsylvania what Farkas and Williams did in Lancaster. Under the guise of suspecting crime, public and private detectives may obtain information on business deals, commercial enterprises, industrial plans, stock transactions, governmental bids and projects. They may intercept telephone messages which can be used for extortion and as a means of giving business concerns secret surveillance over competitors. By dint of this decision of today unsupervised detective agencies may be emboldened to tap wires to obtain unauthorized information for the use of social scavengers, discredited business sharpers and political buccaneers. They may pry into the most personal dealings and the most sacred relationships. They

can tear aside the curtain which shields what the lawyer says to his client, the physician to his patient, the minister to the parishioner, the priest to the penitent, the husband to his wife and the fiance to his betrothed. Because of this decision every honest telephone user must conjure with the possibility that the phantom hand of the electronic eavesdropper may be clutching the very instrument into which he speaks.

The most malevolent scandalmonger without any official authority whatsoever may help himself at the banquet table of the most guarded secrets and may commit burglary of the most precious jewels of family intimacies and be immune from all punishment befitting so heinous and immoral a practise, with the exception of some trifling penalty for malicious mischief or trespass.

The protestations of Justice Holmes and Brandeis in the *Olmstead* case against such a state of things so inimical to American traditions of fairness and honesty were joined in by their brethren Justices Butler and Stone. The conviction in that case (a violation of the National Prohibition Act) was gained by evidence obtained through wire-tapping. By a vote of 5 to 4, the Supreme Court of the United States sustained the conviction. Had the Supreme Court been composed of 7 Justices instead of 9, wire-tapping would even then, in 1928, have been branded illegal. However, ten years later, the reasoning of the Holmes-Brandeis-Butler-Stone dissents became law when the Supreme Court said, in the case of Nardone v. United States, 302 U. S. 379, 383, that "it was less important [through the Communications Act of 1934] that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."

Section 605 of the Federal Communications Act of 1934, 48 Stat. 1103, 47 U. S. C. A. 605, specifically declares, inter alia, that:

". . . No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . ."

Section 501 of the same Act makes a violation of this provision punishable by fine and imprisonment (47 U. S. C. A. 501).

In the *Nardone* case, a Federal agent testified in a United States District Court to obtaining evidence against the defendant through wire-tapping. The Supreme Court held that Section 605 of the Federal Communications Act absolutely forbade the divulging of intercepted telephone messages even though done by a Federal officer and that testifying in court was an act of divulgence prohibited by the statute.

The Majority says that since the telephoning in this case was entirely intrastate the prohibition in the Federal Communications Act does not apply, and cites the case of Weiss v. United States, 308 U. S. 321, as authority for that postulate. But the Weiss case declares just the contrary. On page 327 the Court said:

"The section consists of four clauses separated by semi-colons. The pertinent one is the second: 'and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;" And then added this authoritative utterance:

"Plainly the interdiction thus pronounced is not limited to interstate and foreign communications."

Thus, whether the testimony introduced by Farkas and Williams in the case at bar applied to interstate or intrastate transactions is entirely irrelevant.

The Majority cites Schwartz v. Texas, 344 U. S. 199, in support of its position that the Federal Communications Act does not intend to exclude State agents from testifying in State prosecutions on evidence obtained by wire-tapping. The Supreme Court of the United States in the *Schwartz* case does say that it is for the State, in considering the question of whether or not to allow the introduction of wire-tapping evidence, to compose a "rule of evidence for use in its own courts." But the Supreme Court then goes on to emphasize that: "*Enforcement of the statutory prohibition in § 605 can be achieved under the penal provisions of § 501.*" In other words, while the prohibited evidence may be introduced, the divulger is not immune from prosecution under the penal provisions of the Federal statute.

It is appalling to contemplate that by the Majority's decision, the Pennsylvania courts will immunize violators of a Federal Act and, by giving them *carte blanche* immunity, practically invite them to commit further invasions of the rights of privacy which an Act of Congress was intended to protect.

The Majority says that there is the "inescapable inference" that "the provisions in that Section that 'no person shall divulge' such communications do not include State agents in the phrase 'no person.'" The Majority may find their inference inescapable, but the logic so employed cannot escape from the inference that it is quite illogical, when one considers that the Supreme Court of the United States has held that "no person" includes Federal employees. If the offense of wire-tapping is such an infringement of rights of United States citizens that even Federal officers are not exempt from its penal provisions, certainly Congress would not intend to allow State agents to do what Federal agents are expressly forbidden to do. The interpretation of statutes is sometimes unavoidable where the language in question is vague, misty or obscure, but no interpretive reading glass is required to read that

"no person" means no person. I believe that we can take judicial notice of the fact that the detectives involved in this case, regardless of their subterranean snooping, are still persons.

The Supreme Court of the United States categorically states in this same *Schwartz* case that "the introduction of the intercepted communications would itself be a violation of the statute." The Majority finds nothing controlling in this emphatic statement, by asserting that it is dictum. I cannot bring myself to believe that Mr. Justice Minton who wrote the Opinion for the Court intended that this pregnant sentence was to die aborning.

What the Supreme Court of the United States says to us in the *Schwartz* case is that in preparing a rule of evidence on wire-tapping, we should keep in mind that wire-tapping is a Federal offense and that a wire-tapper is, therefore, a Federal offender. Thus reason, logic, fairness and even a certain degree of self-preservation dictate a severe condemnation by this Court of the United States crime of wire-tapping, no matter by whom committed. Say what one will, no one with a sensitive appreciation of the law can do other than experience shame in witnessing a State official brazenly testifying to violating a law of Congress, especially when this brazen defiance takes place within the very rail of the altar of justice. Justice Brandeis, in his brilliant Dissent in the Olmstead case, said:

> "Decency, security and liberty alike demand that *government officials shall be subjected to the same rules of conduct that are commands to the citizen.* In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. *If the Government becomes a law-breaker, it breeds contempt for law;* it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the

criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

Justice Frankfurter expressed the same abhorrence of governmental violation of the law in the case of On Lee v. United States, 343 U.S. 747, when he said:

"To approve legally what we disapprove morally, on the ground if practical convenience, is to yield to a shortsighted view of practicability . . . Nor are the needs of an effective penal code seen in the truest perspective by talk about a criminal prosecution's not being a game in which the Government loses because its officers have not played according to rule. Of course criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by the 'dirty business' of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet."

But it is urged by the appellee in this case that wiretapping is a potent weapon in fighting criminals. There was a time when the rack, the dungeon, the water-cure and the thumbscrew were used in fighting criminals—and assumed criminals. There was a time when the homes of criminals—and assumed criminals—could be invaded without search warrants. Before Magna Charta and the Writ of Habeas Corpus, the State and those presumably acting in its behalf, could imprison criminals and supposed criminals without warrant of arrest or Court order or any judicial proceeding. There was a time when criminals and supposed criminals were harnessed in stocks, their ears lopped off and their bodies branded with hot irons. Not

long ago police used third degree methods which included rubber hose whippings, forced sleeplessness and other tortures to extract confessions from criminals and supposed criminals. It was argued in their time that to abandon these police methods against criminals would be to place society at the mercy of the lawless. But all these measures were eventually condemned and forbidden—and society did not perish. An enlightened people concluded that the damage done to humanity, society and respect for government by these brutal and barbarous methods far exceeded whatever problematical gain was achieved against evildoers. It was also found that the inhuman practises enumerated were more often used against the innocent than the guilty.

The value of wire-tapping in the prosecution of crime has considerably been over-rated. In the latter part of 1954, the Criminal Justice and Law Enforcement Committee of the Philadelphia Bar Association, after a considerable study of the subject, reported that "there is no indication that law enforcement is better in jurisdictions which use wire tap evidence (e.g., New York, New Jersey, Louisiana, Pennsylvania) than in jurisdictions which prohibit its use (e.g., Federal Government, Michigan, Missouri, West Virginia, Wisconsin)." The Committee declared that "it is impossible to accept assertions that wire tapping is 'essential' to law enforcement."[3]

In the State of New York, officious telephone listening is permitted only after application to and approval by the Court. Supreme Court Justice Samuel H. Hofstadter, after 22 years on the bench, recently turned down requests for wire-tapping permits with the statement that "It cannot even be said in partial extenuation of this *revolting practise* that it yields worthwhile results." The reports made by police on the use of the wire-tap caused Justice Hofstadter to say: "The reports received by me, instead of allaying my anxiety, merely deepened it. These showed few

3. Legal Intelligencer, December 1, 1954.

arrests and fewer convictions, and then rarely, if ever, for a heinous crime."[4]

Even in the case before us here, it is obvious that since the police officers had reason to believe that Chaitt was engaged in the crime of bookmaking, they could have found with the exercise of a little more effort, patience and ingenuity, the way for obtaining the necessary prosecution without themselves committing a crime.

The affirmance of the verdict in this case will serve, as already indicated, to authorize all those *supposedly* engaged in detecting crime to tap wires. We have seen how easily wire-taps may be constructed. There is no law against the manufacture of these secret-thieving machines and, with the decision of today, there now remains no law in Pennsylvania against their use. The person who is indifferent to the import and far-reaching effect of the decision of today might comfort himself with the thought that one could possibly want to break in on *his* telephone wire. That assurance, however, may be shaken when he hears of William J. Mellin who testified before a Senate Sub-Committee that he devoted forty years of his life almost exclusively to wire-tapping. He specified:

> "Incredible as it may seem, I have been able to calculate that in the course of my long career, I have tapped in excess of 60,000 pairs of wires."[5]

Multiplying 60,000 by at least 10, we have to conclude that Mellin listened in on some 600,000 conversations!

Wire-tapping does not end with the mere listening operation. After the wire-leech has sucked in the blood of guarded secrets he is then in a position to blackmail his unwary conversant. He is in a position to traffick with corruption, threats and ill-gotten gains. That such a potential infamy can be tolerated in the name of the enforcement of

4. Legal Intelligencer, January 14, 1955.

5. 83rd Cong., 2nd Sess. Senate Judiciary Subcommittee Hearings on Wire Tapping.

law is the most extraordinary paradox in these paradoxical times. James Lawrency Fly, who served as chairman of the Federal Communications Commission from 1939 to 1944, has made the statement:

> "Wire-tapping and corruption walk hand in hand. Blackmail is one of the safest forms of extortion. The wire-tapper has a great resource for blackmail. No citizen, however innocent, is secure in his communications. Trunk lines and multiple family lines are tapped. Even public booths in great cities have been tapped. The phones of public officials and political headquarters have been tapped . . . It is an essential characteristic of wire-tapping that in each case it is dragnet in character. It invades the privacy, not of one person, but of every innocent person who may use the line—even innocent persons who may be calling innocent persons on the tapped lines. With this risk inherent, the whole theory of freedom of communications and the right of privacy and the Constitutional guarantee against unlawful search are in jeopardy."[6]

Now that the decision of today gives *open sesame* to all wire-tappers, what is to be the attitude of all telephone users in Pennsylvania? Will they approach a telephone with trepidation, fearful of the unknown gluttonous ear at the wire-tap ready to devour all that is to be said? And when the omnivorous wire-tapper has gorged on family secrets, business confidences and government material, what will he do next?

Ten years ago no one would have believed television possible. Yet that amazing magic box is with us today. The next invention in this field will possibly be a camera with lenses which will penetrate walls even as an X-Ray machine cuts through the flesh of anatomy and exposes all the secrets of the skeleton beneath. With this new camera one will be able, by standing on the street or even

6. New Republic, February 6, 1950.

blocks away, to see what is happening inside a home, an office, or a bank. Police and detectives will naturally want to use that camera to look in on bookmaking rendezvous. Private detectives may also want to look into the parlors of homes and dwellings. Will a court of the future hold that such a camera may be used because it will uncover crime? Will it be argued in behalf of that machine that, though its use may destroy all privacy and wreck every standard of decency and delicacy, it yet shall be utilized without limit so long as through its application a bookmaker may be jailed for having bet on Little Colleen, Miss Ellaneous, Ham Bone and Papa Charlie?

Such a glance into the mysterious yet-to-be is not as imaginative as it might seem. Justice Brandeis in his *Olmstead* dissent conjures a situation even more startling than the one at which I have intimated:

> "The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled *to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.* 'That places the liberty of every man in the hands of every petty officer' was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed 'subversive of all the comforts of society.' Can it be that the Constitution affords no protection against such invasions of individual security?"

If wire-tapping, which admittedly is an invasion of privacy, is now authorized on the basis that it helps to detect crime, why shouldn't the law permit the placing of a recording device in physicians' offices? Criminals fre-

quently are injured in making their escape and, while being treated, they give clues which could identify them as law-violators. The law could also authorize the lodgment of a recording device in the confessional where sins and law-violations are recounted. There should also be a tape recorder in every lawyer's office which the police could examine every day. The dragnet for criminals could become more effective by allowing police to enter any home on suspicion and search through every room for possible law-violators. The discovery could be extended by having censors open and read every piece of mail. The third degree could be restored. With this over-all coverage, there can be no doubt that a few more criminals would be caught and properly brought to justice. The job of the police in unearthing crime would be made easier, but the shadows of tyranny would again creep toward Independence Hall and throw a twilight gloom on the Statue of Liberty in New York Bay.